92-1711

No.

Supreme Court, U.S.
FILED
APR 23 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MARK J. GREGG,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

---

PETITION FOR A WRIT OF CERTIORARI

DAVID D. JIVIDEN
Captain, United States Air Force
Appellate Defense Counsel
Counsel of Record

TERRY J. WOODHOUSE
Lt. Colonel, United States Air Force
Chief Appellate Defense Division
Counsel for the Petitioner

Air Force Legal Services Agency
Appellate Defense Division
172 Luke Avenue, Suite 208
Bolling AFB, DC 20332-5113

April 1993

QUESTION PRESENTED

Whether due process and equal protection under the law afforded by the Fifth Amendment requires that military trial and appellate judges be appointed for fixed terms of office?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	2
I. THE DUE PROCESS VIOLATION	3
II. THE EQUAL PROTECTION ARGUMENT	4
III. BECAUSE THE CURRENT AVERAGE DUTY ASSIGNMENT OF AT-WILL JUDGES TO BOTH THE TRIAL AND APPELLATE BENCHES APPROXIMATES THE LENGTH OF A FIXED TERM APPOINTMENT, PROVIDING MILITARY JUDGES WITH CONSTITUTIONALLY-REQUIRED FIXED TERMS WOULD NOT BE DISRUPTIVE TO THE MILITARY JUSTICE SYSTEM	5
CONCLUSION	7
APPENDIX A	1a
APPENDIX B	2a
APPENDIX C	11a

TABLE OF AUTHORITIES

CASES: Page

SUPREME COURT

Bolling v. Sharpe, 347 U.S. 497 (1954) 5
Mathews v. de Castro, 429 U.S. 181 (1976) 5
Matthews v. Eldridge, 424 U.S. 319 (1976) 3
Medina v. California, 112 S.Ct. 2572 (1992) 3
Middenhoff v. Henry, 425 U.S. 25, 44 (1976) 4
Palmore v. United States, 411 U.S. 389 (1973) 3
Schesinger v. Ballard, 419 U.S. 498 (1975) 5
Tumey v. Ohio, 274 U.S. 510 (1927) 7
United States v. Raddata, 447 U.S. 667 (1980) 3
United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955) 3

MILITARY CASES

United States v. Allen, 33 M.J. 209 (C.M.A. 1996) .. 7
United States v. Berry, 34 M.J. 83 (C.M.A. 1992) .. 6
United States v. Graft, 35 M.J. 450 (C.M.A. 1992) .. 3, 5, 7
United States v. Mabe, 33 M.J. 200 (C.M.A. 1991) .. 7
United States v. Scott, 32 M.J. 644 (C.G.C.M.R. 1991) 4

CONSTITUTIONAL PROVISIONS:

United States Constitution Amendment V 3, 7

STATUTES:

Art. 66(a), 10 U.S.C. § 826(a) (1988) 6

MISCELLANEOUS:

R. v. Genereux, [1992] 1 S.C.R. 259, 70 C.C. 7
Brief of the Petitioner in support of the Petition for a Writ of Certiorari to the United States Court of Military Appeals in *Ronald D. Graf v. United States of America*, No. 92-1102, December 29, 1992) 3, 5
Interview with the Honorable Judge Larry W. Price, Assistant Chief Trial Judge, USAF Trial Judiciary, Bolling Air Force Base, Washington, D.C. (January 19, 1993) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No.

MARK J. GREGG,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

---

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Mark J. Gregg, respectfully prays that a writ of certiorari issue to review the order and judgement of the United States Court of Military Appeals entered in his case on March 3, 1993.

OPINIONS BELOW

The order and judgement of the United States Court of Military Appeals is reported at Appendix A. The unreported opinion of the United States Air Force Court of Military Review, issued on January 8, 1992, is found at Appendix B.

JURISDICTION

The final order of the United States Court of Military Review was entered on 3 March 1993. (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3) (Supp. 1992) and 10 U.S.C.A. § 867(a) (Supp. 1992).

CONSTITUTIONAL AND RULE FOR COURTS-MARTIAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

On July 16, 17, 1990 the petitioner, a Staff Sergeant (E-5), was tried by a general court-martial composed of officer members at Wilder Air Station, Idaho. Contrary to his pleas, he was convicted of sodomy in violation of Article 125 [10 U.S.C. §§ 925].[1] He was sentenced to a bad conduct discharge, confinement for one year, and reduction to airman basic (E-1).

On appeal, *inter alia,* the appellant raised the issue of whether he was denied the due process and equal protection under the law afforded by the Fifth Amendment in being denied trial and appellate judges who enjoy the protection of fixed terms of office. The Air Force Court of Military Review denied the request for relief in their opinion dated 8 January 1992. Appendix B.

The Court of Military Appeals granted review of that decision on 18 May 1992. Appendix C. The court subsequently, on further consideration in light of its previous decision in *United States v. Graf,* 35 M.J. 450 (C.M.A. 1992), affirmed the decision of the United States Air Force Court of Military Review. (Appendix A.)

REASONS FOR GRANTING THE WRIT

The reasons why this Honorable Court should grant review on the question presented are set out in the Brief of the Petitioner in support of the Petition for a Writ of

---

[1] He pled not guilty to, and was acquitted of, an additional charge of carnal knowledge under Article 120, UCMJ.

Certiorari to the United States Court of Military Appeals in *Ronald D. Graf v. United States of America,* No. 92-1102 December 29, 1992 and are only summarized below.

I. THE DUE PROCESS VIOLATION.

The Court of Military Appeals erred when they rejected the petitioner's due process objection to the lack of fixed terms of office for military judges for two reasons. First, the case the Court of Military Appeals relied on below, *United States v. Graft,* 35 M.J. 450 (C.M.A. 1992), inappropriately rejected the balancing test set forth in *Matthews v. Eldridge,* 424 U.S. 319 (1976), which had long been used to resolve Fifth Amendment due process claims. Instead, the court used the less exacting Fourteenth Amendment due process standard enunciated in *Medina v. California,* 112 S.Ct. 2572 (1992), which involved review of a state criminal conviction. Second, *Graft,* treated dicta from *United States ex rel. Toth v. Quarles,* 350 U.S. 11 (1955), and *Palmore v. United States,* 411 U.S. 389 (1973), as approving the lack of fixed terms of office, and announced a new rule that military judges could not be removed in retaliation for their judicial decisions. Nowhere did the Court of Military Appeals suggest that military necessity precludes fixed terms for military judges generally, let alone for whose who sit on the courts of Military Review in the Washington, D.C. area or for courts-martial like the petitioner's that are held in peacetime.

The lower court's application of *Medina's* Fourteenth Amendment due process analysis to a federal Fifth Amendment due process claim is ample reason to hear the case. Indeed, in *Medina* this court left open the correctness of one of its prior decisions—*United States v. Raddata,* 447 U.S. 667 (1980)—which had applied *Matthews v. Eldridge* to a due process challenge to a

federal criminal conviction. Petitioner believes that respect for state legislative judgements made by state legislatures (*Medina*), or with those made by Congress for the Armed Forces, *Middenhoff v. Henry*, 425 U.S. 25, 44 (1976), are inapplicable here because there is no evidence that in 1968, when Congress established the offices of military trial and appellate judge, it gave any thought to terms of office, let alone specifically legislated to preclude them.

In times of war or other serious exigency, military necessity may require some adjustments regarding the tenure of trial judges, although not for the appellate judges who comprise the four Court of Military Review, which sit permanently in the Washington, D.C. area. Moreover, neither the government nor the Court of Military Appeals has sought to justify the lack of any fixed term of office on ground of military necessity. Instead, the Court of Military Appeals relied on other alleged protections against improper retaliation against military judges for unpopular decisions—some of which it first announced in *Graft*—although none of them can be invoked by an accused, even if they were actually, as opposed to theoretically, available to the judges themselves. But even if those protections served to prevent naked retaliation, they cannot possibly guard against the more subtle and virtually undetectable problems of adverse or "faint praise" fitness reports that can have significant impacts on promotions, future assignments, or susceptibility for involuntary early retirement for all military judges.

II. THE EQUAL PROTECTION ARGUMENT.

Although the "Fifth Amendment does not contain an Equal Protection Clause, as does the Fourth Amendment, it provides equivalent protection from discriminating actions on the part of the Federal Government." *United States v. Scott*, 32 M.J. 644, 646 (C.G.C.M.R. 1991).

See, Mathews v. de Castro, 429 U.S. 181 (1976); *Schesinger v. Ballard,* 419 U.S. 498 (1975), *reh. denied* 420 U.S. 966; *Bolling v. Sharpe,* 347 U.S. 497 (1954). On this basis, and absent a military necessity, the appellant is entitled to the same protections afforded to similarly situated civilian citizens who are subject to like charges. The appellant's Fifth Amendment equal protection rights was accordingly violated when, unlike civilians, his trial was presided over by an at-will military judge.

III. BECAUSE THE CURRENT AVERAGE DUTY ASSIGNMENT OF AT-WILL JUDGES TO BOTH THE TRIAL AND APPELLATE BENCHES APPROXIMATES THE LENGTH OF A FIXED TERM APPOINTMENT, PROVIDING MILITARY JUDGES WITH CONSTITUTIONALLY-REQUIRED FIXED TERMS WOULD NOT BE DISRUPTIVE TO THE MILITARY JUSTICE SYSTEM.

One of the linchpins on which the lower court's decision in *Graft* rested was their assertion that "[i]n reality, the Uniform Code of Military Justice (UCMJ) provides substantial independence and protection for military judges, both trial and appellate, despite their subordinate position in the military hierarchy." *United States v. Graft,* 35 M.J. 450, 46 (C.M.A. 1992). Similarly, the Court of Appeals also noted its precedent would condemn any retaliatory removal of at-will judges as a violation of the UCMJ and the constitutional guarantee of judicially independent and impartial judges. *Id.* at 465. As illustrated in the Petitioner's brief in *Graf v. United States of America,* No. 92-1102, December 29, 1992, 16-22, these protections are illusory and not an efficacious substitute for fixed terms. Indeed, when one considers the rather simple manner in which trial and appellate judges could be provided with a fixed term of office, thereby preventing the chilling effect of both potential and actual pressure with regard to their judicial duties, opposition to such a measure on

a fiscal or administrative basis becomes incomprehensible. It must be emphasized that courts-martial take place in a rigidly hierarchial structure, and that allowing at-will judges to preside over court-martials violates the premise that courts-martial should not only be fair, "but also appear fair to effectively further the cause of good order and discipline in the armed forces." *United States v. Berry*, 34 M.J. 83, 88 (C.M.A. 1992).

Assignments in the United States Air Force Judge Advocate Corps emanate in The Professional Development Division of the Office of Judge Advocate General. After identifying potential judges, the final selection is made by the Judge Advocate General of the Air Force. UCMJ Art. 66(a), 10 U.S.C. § 826(a) (1988). Those selected serve as judges for a regular tour of duty, as any other assigned judge advocate.[2] Providing military judges with fixed terms of office would thus be a rather simple procedure. After receiving an assignment as a military trial or appellate judge, a judge advocate would merely have to be informed, via his official orders, that his assignment as a judge was for a fixed term of years. Removal as a judge would take effect only for misconduct. This procedure is followed in similar fashion with regard to permanent change of station assignments, where the military member is informed that his assignment to a particular location is for a fixed term of years. The inviolate nature of the military judge's term of office can be easily memorialized in a punitive regulation as well, in order to leave no doubt in service men and women's minds that the judges' in the military are truly independent and impartial.

In sum, applying fixed terms of office to military judges would not disrupt the current assignment process insomuch as military judges currently serve as at-will judges

---

[2] Interview with the Honorable Judge Larry W. Price, Assistant Chief Trial Judge, USAF Trial Judiciary, Bolling Air Force Base, Washington, D.C. (January 19, 1993.)

for an average of three to five years. Providing them with a guarantee of a fixed term for that or a similar length of time would thus provide them with judicial independence without wrecking havoc with JAG personnel assignments, or "infringe on military personnel flexibility." *Graft*, 35 M.J. at 464.

CONCLUSION

Military men and women are entitled to truly independent judges. The pressures felt by military judges serving at-will is not illusory, it is all-to-sadly tangible.[3] American servicemen and women are no less deserving of a military justice system which promotes not only the actuality of an independent judiciary, but of its perception as such, than are their allied comrades who are afforded such protections.[4] Neither the actuality nor the perception of an independent military judiciary is true unless the Fifth Amendment constitutional guarantees of due process are respected and military judges guaranteed fixed terms of office. The Court of Appeals failed to justify such a massive exception to the generally-accepted principle of American jurisprudence, as reflected in such due process cases as *Tumey v. Ohio*, 274 U.S. 510 (1927), and in the nearly universal fact that state judges have fixed terms of office, such that judicial independence for those who preside at criminal trials and hear criminal appeals is an absolute minimum protection for the accused.

---

[3] 25% of military trial judges and 24% Court of Military Review judges were aware of situations in which a judge was threatened with reassignment or actually reassigned due to a decision. Dep't of Defense, The Military Justice Act of 1983, Advisory Commission Report 365 (1985) (table 1). Examples of attempted interference with trial judges can be found at *United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991), (Chief Trial Judge expressing concern about lenient sentences to trial judge); *United States v. Allen*, 33 M.J. 209 (C.M.A. 1991) (Deputy Judge Advocate of the Navy called Chief Judge of the Navy to express concern regarding a detailed judge's reputation as a light sentencer.)

[4] R. v. Genereux, [1992] 1 S.C.R. 259, 70 C.C.C.3d 1 (1992).

Reviewing this case would thus allow this Honorable Court to assess an easily-changed administrative practice which strikes at the heart of judicial integrity under the UCMJ, a current system which tolerates a situation wherein the terms of office of a military judge can be cut short by a military officer who is the ultimate superior of both the judge and the prosecutor. Accordingly, the Court should issue a writ of certiorari.

Respectfully submitted,

DAVID D. JIVIDEN
Captain, United States Air Force
Appellate Defense Counsel
Counsel of Record

TERRY J. WOODHOUSE
Lt. Colonel, United States Air Force
Chief Appellate Defense Division
Counsel for the Petitioner

Air Force Legal Services Agency
Appellate Defense Division
172 Luke Avenue, Suite 208
Bolling AFB, DC 20332-5113

April 1993

APPENDICES

APPENDIX A

UNITED STATES OF MILITARY APPEALS

USCMA Dkt. No. 67774/AF
CMR Dkt. No. 28848

UNITED STATES,
Appellee

v.

MARK J. GREGG (003-46-5811),
Appellant

ORDER

On further consideration of the granted issue in light of *United States v. Graf*, 35 MJ 450 (CMA 1992) it is by the Court this 3rd day of March, 1993

ORDERED:

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of Air Force
Appellate Defense Counsel (JIVIDEN)
Appellate Government Counsel (BLACKWELL)

APPENDIX B

UNITED AIR FORCE COURT OF MILITARY REVIEW

UNITED STATES

v.

Staff Sergeant MARK J. GREGG, FR 003-46-5811
UNITED STATES AIR FORCE
ACM 28848 (f rev)

8 January 1992

Sentence adjudged 17 July 1990 by GCM convened at Mountain Home Air Force Base, Idaho. Military Judge: Gregg H. Reinecke.

Approved sentence: Bad-conduct discharge, confinement for 1 year, and reduction to E-1.

Appellate Counsel for the Appellant: Mr. Charles F. Peterson, Esq. (argued), Captain David D. Jividen (argued), Lieutenant Colonel Jeffrey R. Owens, and Major Ronald G. Morgan.

Appellate Counsel for the United States: Major Morris D. Davis (argued), Captain David C. Wesley (argued), and Colonel William R. Dugan, Jr.

Before

LEONARD, RIVES, and JAMES
Appellate Military Judges

UPON FURTHER REVIEW

JAMES, Judge:

Staff Sergeant Gregg was convicted of one specification of sodomy. He brought to our attention that the action on his conviction under R.C.M. 1107 had been taken by a commander who was himself suspected of misconduct. In "an abundance of caution over the need to preserve the appearance of propriety in the military justice system," we set aside that action. The case was returned for new review and action by a different convening authority.

A new convening authority has reviewed and acted on the the case, and it is now appropriate for us to address the adequacy of the proof and the propriety of the sentence, Article 66(c), UCMJ; 10 U.S.C. § 866(c) (1988). Appellant also renews his complaint that the convening authority was disqualified and adds that we erred when we did not order discovery or a fact-finding hearing to determine whether the convening authority was disqualified.[1] In short, appellant complains that the relief already ordered was inadequate. We address each of his assign-

[1] Our internal rules permit an appellant to move to file a supplemental assignment of errors when a case has been returned after such a remand. Internal Rule 7-4.d. Appellant did file a supplemental assignment of error under Courts of Military Review Rules of Practice and Procedure, rule 23 (motions) and Internal Rule 5-1 (motions), and appellee has responded. Appellee correctly observes that one of the supplemental assignments simply renews in a different guise the error assigned in appellant' original assignment. Appellee also observes correctly that the second error assigned in the supplemental assignment exceeds the limitation of our prior order, which restricted the supplemental assignments to matters raised by our remand, and is untimely under Courts of Military Review Rules of Practice and Procedure, rule 15(a). We overlook these aspects of appellant's pleadings because we are confident that they are filed in good faith, and we dispose of his assignments. We caution counsel, however, to be attentive to our rules and to the briefing schedules for which they provide. Here as elsewhere our past generosity does not establish the standard for interpreting the rules.

ments below. We find no error, and we approve the findings and sentence.

I. Appellate Discovery or Fact-Finding Inquiry

Appellant moved for appellate discovery. He asked that we order production for him of investigative reports, et cetera, from any inquiry into the original convening authority's misconduct or that we order a fact-finding inquiry under R.C.M. 1102 such as that in *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967). In the alternative, appellant asks that we set aside his conviction.

We have no doubt of our authority to order fact-finding hearings when necessary. R.C.M. 1102. However, appellant makes no serious case for the exercise of any right to discovery at the appellate level. Instead he alludes generally to Fifth and Sixth Amendment rights; cites R.C.M. 701, a discovery rule that appears in chapter 7 of the Rules for Courts-Martial, entitled "Pretrial Matters"; and cites *United States v. Hart*, 29 M.J. 407 (C.M.A. 1990), a *Brady*[2] decision about denial of disclosure at and before the trial. We assume without deciding that such a right exists, but we find no possible remaining relevance of the material appellant seeks, assuming that the material exists. To continue our analysis, we first review the roles that the general court-martial convening authority played in this case.

A. Facts

The record shows that, as is typical in Air Force practice, this case first arose and was investigated in a command distant from the headquarters of the general court-martial convening authority. The appellant was assigned to a detachment of a Strategic Air Command

---

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

bombing range group. The detachment was at Wilder Air Station in Idaho. The charges were preferred by the SAC detachment commander. They were forwarded by him to the commander of the 366th Tactical Fighter Wing, a unit of Tactical Air Command. The wing was headquartered at Mountain Home Air Force Base in Idaho. The case was investigated there pursuant to Article 32, UCMJ, 10 U.S.C. § 832 (1988), by a person assigned to that wing and on the orders of the wing commander. It was then forwarded by the wing commander to the general court-martial convening authority, the commander of a numbered air force headquartered at Bergstrom Air Force Base in Texas. The record shows no earlier involvement by him.

The record does, of course, show that the general court-martial convening authority detailed the members of the court-martial and referred this case to it for trial. As is typical in Air Force practice, he did both contemporaneously. Although in some cases a general court-martial convening authority might do other acts prior to trial, the record shows none in this case. This record shows only that he detailed the members and referred the case to them for trial.

The pleadings to date have shown only one possibility as to any relevance of an investigation of the convening authority's own misconduct: It might show that he had committed crimes of a sexual nature or that his own misconduct was equally reprehensible, even if not criminal. Our prior disposition recognized that the effect of the consciousness of one's own misbehavior might be reflected in decisions about the misbehavior of others. We must now decide whether there is any such potential for prejudice at referral and selection of the members of the court-martial.

B. Referral

Referral is not the first step in a prosecution. First comes preferral, an act that requires an oath. Article 30(a), UCMJ, 10 U.S.C. § 830(a) (1988); R.C.M. 307. The accusation may result from or cause a unit commander's informal inquiry under R.C.M. 303. After that inquiry, the union commander must decide for himself whether he will forward the charges and what recommendations as to disposition he will make. R.C.M. 401 (c). In cases like this one, a formal investigation is required by Article 32, UCMJ, 10 U.S.C. § 832 (1988). This investigation is designed in part to supply the information and objective recommendations that will permit other decisionmakers to divert from trial cases in which the charges have no basis. *See* R.C.M. 401-407. That investigation is typically ordered (and was conducted in this case) by an intermediate commander. That intermediate commander must also decide for himself whether to forward the charges and what disposition to recommend. R.C.M. 404.

All these events happened in appellant's case. None of the decisionmakers to this point was the convening authority whose conduct later came under suspicion. All the persons required to state a recommendation recommended that the case be referred to a general court-martial for trial.

Referral is simply a decision that a case shall be put to the test, that an on-going prosecution shall be permitted to continue. Referral says nothing about guilt or punishment. Thus, there is little possibility that an accused can be harmed by a faulty referral; the trial is usually both the right and the remedy. Though we are mindful of the distress that trial would impose on an innocent, we note that an accused is protected from trial on groundless charges by the procedures outlined above.

There is an objective standard for referral: The convening authority need only find or be advised that there are "reasonable grounds to believe that an offense triable by court-martial has been committed and that the accused committed it, and that the specification alleges an offense." R.C.M. 601(d)(1). *See* Article 34(a), UCMJ, 10 U.S.C. § 834(a) (1988). Thus we can examine the advice of the staff judge advocate under Article 34 and report of the investigation under Article 32 to determine whether the evidence showed probable cause and, if it did, conclude that the case could have referred to trial by *any* convening authority, regardless of psychological baggage. We have done that in this case, and we find the advice and the report of the investigation provided the required grounds for referral.

We are not so fortunate when we consider the choice of forum, for there is no objective standard for disposition choice. However, we can look at the two charges of which the appellant was accused—carnal knowledge and consent sodomy—and conclude that referral to a general court-martial was certainly not an abuse of discretion. We can also consider the recommendations of the commanders and investigating officer who forwarded the case to the general court-martial convening authority. Their recommendations were consistent: The case should be tried by a general court-martial.

Thus, we are left only with one question about the referral: Was it by a person who was disqualified to act? Article 22(b) UCMJ, 10 U.S.C. § 822(b) (1988). There is only one such disqualification, that the convening authority was an accurser, but that word is given broad meaning: It includes any person whose interest in the matter is "other than official." Article 1(9), UCMJ, 10 U.S.C. § 801(9) (1988); R.C.M. 601(c), Discussion.

United States v. Thomas, 22 M.J. 388 (C.M.A. 1986), on which appellant relies exclusively in this regard, discusses several examples of circumstances that illustrate the kind of interest that is disqualifying. All the convening authorities who were disqualified in those examples suffered some direct involvement with the accused's crime, much more palpable than the possibility of subtle subconscious influences arising from wholly different, collateral events. *Thomas*, 22 M.J. at 394. The convening authority in *Thomas* was found to have committed impermissible command influence when, through "misguided zeal," he criticized commanders who would forward a case with recommendations for trial in a forum authorized to adjudge a punitive discharge and yet appear as sentencing witnesses to recommend retention. That interest was found to be official, not personal, and therefore not disqualifying as to referral. *Id.* If command influence is not disqualifying for referral, it is hardly likely that the convening authority in this case was disqualified.

C. Detailing the Court-Martial

Having found the collateral events in this case to be other than disqualifying even if proven, we turn to the convening authority's role in selecting and detailing the members of a court-martial. Does that responsibility require that the convening authority be free of misconduct? We think not. As we remarked above, there is an automatic remedy for any error in referral: The accused has the opportunity to be vindicated at trial. There are also remedies for discovery and correction of errors that infect selection of the members of a court-martial. Pretrial questionnaires and voir dire permit an accused to participate directly in an examination of the qualifications of each of the members. R.C.M. 912(a)(1), (d), and R.C.M. 912(a)(2) and (b) give an accused access to the selection process and a special opportunity to correct an error that infects the entire process. Counterbalancing that special opportunity to inspect the process is the

waiver provision of R.C.M. 912(b)(3). There was no motion for relief from improper selection methods in this case, and so that issue is waived. The application of waiver to issues about the qualifications of each member is more complicated but equally fatal when, as here, the issue was not asserted through a challenge at trial. R.C.M. 912(f)(4), (g)(2). Appellant waived his opportunities to explore these issues at trial.

We have concluded that issues relating to the selection and detailing of the members of this court-martial were waived and, further, that there is no possibility that any collateral misconduct of the convening authority could have disqualified him from referring the case. The details of any misconduct that convening authority might have committed are therefore irrelevant. A fact-finding hearing or discovery would be unwarranted. These assignments of errors are without merit.

II. Testimony of Mrs. K

Appellant complained that the testimony of a Mrs. K, called by the prosecution in rebuttal, was irrelevant in that it failed to rebut anything offered by the defense. This matter was litigated in limine at trial, and defense counsel's objection was overruled. A military judge has considerable latitude to determine relevance and matters of trial economy under Mil. R. Evid. 401 through 403. *E.g., United States v. Orsburn*, 31 M.J. 182, 187 (C.M.A. 1990); *see also* R.C.M. 801(a)(3), 913(c)(1)(E). We have no difficulty seeing the relevance of Mrs. K's testimony, and we find no reason to reverse the military judge's implicit finding that concerns of economy did not warrant exclusion.

III. Sufficiency of the Evidence

Appellant also complains that the evidence was inadequate to sustain the conviction. His argument relies on his assessment of the credibility of the witnesses; there is no

doubt that the testimony, if believed, was adequate to sustain the conviction as a matter of legal sufficiency. Accordingly, we also turn to the adequacy of the evidence as a matter of fact, and we examine it independently to assure that we, too, are convinced beyond a reasonable doubt that the appellant is guilty. We are. The record is ample to support the present conviction. *See generally United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

IV. Sentence Appropriateness

We have also examined the record, the convictions, and the sentence, giving due consideration ot the characteristics of this offender and to the crimes of which he was convicted. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988); *United States v. Wingate*, 27 M.J. 128 (1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We are satisfied that the sentence is not inappropriate.

V. Tenure

Finally, appellant argues that he was denied due process because his case was tried and his appeal decided by judges who lack tenure. This assignment of error is without merit. *United States v. Toro*, —— M.J. —— (A.F.C.M.R. 1991).

The findings of guilty and the sentence are correct in law and fact and, on the basis of the entire record, are

AFFIRMED.

Senior Judge LEONARD and Judge RIVES concur.

OFFICIAL

[SEAL]

/s/ Pamela D. Stevenson
PAMELA D. STEVENSON
Captain, USAF
Chief Commissioner

APPENDIX C

UNITED STATES COURT OF APPEALS

USCMA Dkt. No. 67774/AF
CMR Dkt. No. 28848

UNITED STATES,
Appellee

v.

MARK J. GREGG (003-46-5811),
Appellant

ORDER GRANTING REVIEW

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Military Review, it is by the Court this 18th day of May, 1992

ORDERED:

That said petition is hereby granted on Issue III raised by appellate defense counsel.

No briefs will be filed under Rule 25.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (JIVIDEN)
Appellate Government Counsel (BLACKWELL)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 349409 70023

Supreme Court, U.S.
FILED
JUN 07 1993
OFFICE OF THE CLERK

No. 92-1711

In the Supreme Court of the United States

OCTOBER TERM, 1992

MARK J. GREGG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

RICHARD L. PURDON
Colonel, AFLSA, USAF

JEFFREY T. INFELISE
Lieutenant Colonel, AFLSA, USAF

JULES D. SILBERBERG
Captain, AFLSA, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Air Force Legal Services Agency
Bolling Air Force Base
Washington, D.C. 20332-5113

QUESTION PRESENTED

Whether due process requires that military judges have a fixed term of office.

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1711

MARK J. GREGG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the Court of Military Appeals, Pet. App. 1a, is not yet reported. The opinion of the Air Force Court of Military Review, Pet. App. 2a-10a, is unreported.

JURISDICTION

The final order and judgment of the Court of Military Appeals was entered on March 3, 1993. The petition for a writ of certiorari was filed on April 23, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial at Wilder Air Station in Idaho, petitioner, a member of the United States Air Force, was convicted of one count of sodomy, in violation of Article 125 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 925. He was sentenced to confinement for one year, a bad conduct discharge, and a reduction in rank to the lowest enlisted grade. Pet. 2. The convening authority approved the findings and sentence. The Air Force Court of Military Review initially set aside the actions of the convening authority and returned the case for new review and action by a different convening authority after petitioner informed the court that the first convening authority was himself suspected of misconduct. Pet. App. 3a. After the new convening authority also approved the findings and sentence, the Air Force Court of Military Review affirmed the findings and the sentence. Pet. App. 2a-10a. The Court of Military Appeals granted discretionary review and affirmed. Pet. App. 1a.

Trial and appellate judges in the Air Force are not appointed for fixed terms of office. *United States v. Toro*, 34 M.J. 506, 522-523 (A.F.C.M.R. 1991). The Judge Advocate General of the Air Force selects officers for assignment as military judges. Arts. 1, 26, and 66, UCMJ, 10 U.S.C. 801, 826, and 866. Assignment length is at the discretion of the Judge Advocate General, but it is generally for a standard tour of duty, *i.e.*, about three years. Pet. 6.

DISCUSSION

Petitioner claims that his trial and his appeal to the Air Force Court of Military Review were fundamen-

tally unfair because the military judges sitting on those courts do not enjoy fixed terms of office and can be reassigned to other military duties by the Judge Advocate General based on his evaluation of their performance as judges. The question presented by petitioner is not materially different from Question 2 presented by the petitioner in *Weiss* v. *United States*, cert. granted, No. 92-1482 (May 24, 1993). We therefore believe that the Court should hold the petition in this case pending its decision in *Weiss*.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's resolution of *Weiss* v. *United States*, cert. granted, No. 92-1482 (May 24, 1993), and should then be disposed of as appropriate in light of that case.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

RICHARD L. PURDON
Colonel, AFLSA, USAF

JEFFREY T. INFELISE
Lieutenant Colonel, AFLSA, USAF

JULES D. SILBERBERG
Captain, AFLSA, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Air Force Legal Services Agency

JUNE 1993